

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED

JAN 24 2003

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

BY _____
DEPUTY CLERK

MARY ANN RANDOLPH on behalf of
herself and all others similarly situated,

Plaintiff,

VS.

OXMOOR HOUSE, INC.,

Defendant.

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CIVIL ACTION NO. SA-01-CA-699-FB

ORDER ACCEPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

The Court has considered the Report and Recommendation of the United States Magistrate Judge filed in the above-captioned cause on December 26, 2002 (docket #37). According to the docket sheet, plaintiff acknowledged receipt of the Report and Recommendation on December 30, 2002, and defendant also acknowledged receipt of the Report and Recommendation on December 30, 2002. No objections to the Report and Recommendation have been filed by either party.¹

Because no party has objected to the Magistrate Judge's Report and Recommendation, the Court need not conduct a de novo review. See 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). The Court has reviewed the Report and finds its reasoning to be neither clearly erroneous nor contrary to law. United States v. Wilson, 864 F.2d 1219, 1221 (5th Cir.), cert. denied, 492 U.S. 918 (1989). The Recommendation shall

¹ Any party who desires to object to a Magistrate's findings and recommendations must serve and file his written objections within ten days after being served with a copy of the findings and recommendation. 28 U.S.C. § 635(b)(1). Service upon a party must be made by mailing a copy to the party's last known address. FED. R. CIV. P. 5(b). "Service by mail is complete upon mailing." Id.

therefore be accepted pursuant to 28 U.S.C. § 636(b)(1) such that (1) plaintiff's motion for leave to file a second amended complaint should be GRANTED and the second amended complaint attached to the motion should be filed; (2) to the extent the second amended complaint re-alleges a claim under 39 U.S.C. § 3009, that claim should be considered as STRICKEN from the second amended complaint and considered a nullity in light of this Court's previous holding that there is no private right of action under § 3009; (3) plaintiff's motion to transfer venue should be DENIED; (4) plaintiff's supplemental state law claims and any motion for class certification contained in the second amended complaint should be REMANDED to the 166th Judicial District Court of Bexar County, Texas; (5) defendant's motion for more definite statement should be DENIED WITHOUT PREJUDICE to consideration or reconsideration by the presiding state court; and (6) all other requests for relief are DENIED.

Accordingly, it is hereby ORDERED that the Report and Recommendation of the United States Magistrate Judge filed in this cause on December 26, 2002 (docket #37), is ACCEPTED pursuant to 28 U.S.C. § 636(b)(1) such that (1) plaintiff's motion for leave to file a second amended complaint (docket #28) is GRANTED and the Clerk shall file the second amended complaint attached to the motion; (2) to the extent the second amended complaint re-alleges a claim under 39 U.S.C. § 3009, that claim is considered STRICKEN from the second amended complaint and considered a nullity in light of this Court's previous holding that there is no private right of action under § 3009; (3) plaintiff's motion to transfer venue (docket #27) is DENIED; (4) plaintiff's supplemental state law claims and any motion for class certification contained in the second amended complaint (docket #28) are REMANDED to the 166th Judicial District Court of Bexar County, Texas; (5) defendant's motion for more definite statement (docket #35) is DENIED

WITHOUT PREJUDICE to consideration or reconsideration by the presiding state court; and (6) all other requests for relief are DENIED. IT IS FURTHER ORDERED that the Clerk of the Court send a certified copy of this Order to the clerk of the state court.

It is so ORDERED.

SIGNED this 24th day of January, 2003.



FRED BIERY
UNITED STATES DISTRICT JUDGE